United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1113

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United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

FRANCISCO ADRIANO ARMEDO-SARMIENTO, aka Eduardo Sanchez, aka Pacho el Mono, aka Elkin, aka Francisco Velez, EDGAR RESTREPO-BOTERO, aka Omar Hernandez, aka el Sobrino, aka Edgar, LEON VELEZ, JORGE GONZALEZ, aka Jorge Arbolede, LIBARDO GILL, aka Ramiro Estrada, RUBEN DARIO ROLDAN, CARMEN GILL, aka Carmen Estrada-Restrepo, aka Carmen Maso, WILLIAM RODRIGUEZ-PARRA, aka Jairo, OLEGARIO MONTES-GOMEZ,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

JOINT REPLY BRIEF FOR APPELLANTS PARRA AND GOMEZ

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POINT I AND II

THE COURT BELOW ERRED IN FAILING TO GIVE DEFENDANTS PARRA AND GOMEZ CREDIT FOR TIME SERVED IN FEDERAL CUSTODY PRIOR TO SENTENCING. APPELLANTS SHOULD BE GIVEN CREDIT FOR TIME SPENT IN FEDERAL CUSTODY FROM THEIR ARREST ON JUNE 11, 1973.

The government's brief attacks Parra and Gomez' argument on the jurisdictional question of whether their appeal is premature and on the substantive question of whether a person who is indicted while incarcerated can get any credit for time served pending the trial of his second charge. The government contends that the defendants must exhaust their administrative remedies before appealing to this court, to wit, they must petition the Attorney General or the Director of the Bureau of Prisons, then receive from tham a decision denying credit for time served for which they claim they are entitled to. This contention is without substance.

Defendants Parra and Gomez are attacking an illegal sentence. An illegal sentence may always be attacked on appeal without first determining from the Bureau of Prisons whether credit for time served will be appropriately granted. United States v. Mack, 466 F.2d 333 [1972] CADC; Rule 35 FRCP.

Defendants were sentenced on March 5, 1976, five days after the other defendants were sentenced. The cause of the delay was an administrative inability to produce defendants on March 1st, the original date for sentencing. If we accept the government's position, defendants Parra and Gomez would be required to serve five [5] days additional time to their sentence,[1/] merely becuase of some freakish happenstance unrelated to the merits of the case. It is manifestly unjust for this five [5] days loss to be attibuted to the defendants through no fault of their own.

Following this argument in its logical sequence, the delay in sentencing from the date of conviction [January 23, 1976], until the original scheduled date of sentence [March 1, 1976], was due to the requirement of a pre-sentence report [another administratively caused delay not properly attributable to the defendant]. Had defendants known of the court's intention, they would have requested an expedited pre-sentence report. Continuing this

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1. The court indicated that the ten [10] years sentence was to run effective as of the date of sentence.

logical process, any delay from the date of the indictment on May 11, 1974 until the present time, should not be lost to the defendants because they were powerless to avoid the delay.

The resultant conviction is treated separately from the prior conviction by the Bureau of Prisons.

The court's sentence denying defendants credit during which time they waited in the Metropolitan Correctional Center for the trial, must be credited to their sentence. Had they not been indicted on the second charge, they would have been in a more permanent Federal institution which would have enabled them to more effectively earn good time credit, to utilize the rehabilitative facilities available in prisons and to certainly be a better candidate for parole consideration. All this was denied defendants because of their reindictment.

Whether the defendants were in jail because of a prior sentence or because of an inability to make bail, is besides the point. No such distinction is made in Section 3568 and the Federal Prison Policy Statement cited on page 127 of the government's brief clearly has no binding effect upon this court nor can it be cited as authority for that proposition. The cases cited by the government are inapposite inasmuch as all those cases dealt with credit for time served in State custody when subsequently turned

over to the Federal prisons. The rationale for this distinction is clear. A prisoner's behavior in State custody cannot be evaluated by a Federal Board of Parole nor can he be rehabilitated in a manner which the Federal prison system has a right to control. Therefore, time served by a prisoner in a State Court cannot and should not be properly credited to a Federal sentence. This argument does not apply where a defendant is serving two [2] concurrent Federal sentences.

The legislative history of Section 3568 and the intent of Congress applies with equal vigor whether defendants are in jail as a result of a prior sentence or whether he was in jail as a result of inability to make bail. Had the Judge chosen to sentence him to thirteen years in jail, he should have done so, but in doing so he may have run the risk of having the sentence reversed as being excessive. Consider that Parra and Gomez were mere couriers and relatively unimportant in the conspiracy. Consider also the maximum sentence which could have been imposed was 15 years and lastly that only Botero and Sarmientc,of all defendants, received a sentence in excess of 10 years and we may infer that an Appellate Court may have concluded that a sentence of 13 years was excessive if that were the legal sentence rather than the ctual sentence.

Lastly, the legislative history of 18 U.S.C. 3568 indicates that credit is to be given for time served where the sentence is for acts for which the person was arrested. It is clear from appellants' Appendix that the arrest was for conspiracy even though defendants were not indicted for that crime. It is equally clear that the court considered defendant a part of a group from the language used at the sentencing hearing. See Appendix.

CONCLUSION

DEFENDANTS SHOULD BE GIVEN CREDIT FOR TIME SERVED FROM THE DATE OF THEIR ARREST ON JUNE 11, 1976.

Dated: New York, New York
August 24, 1976.

Respectfully submitted,

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I served 2 copies on the
US Attorney by Mail on August 25, 1972

Leonard Stevenson